



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
SEVEN OAKS DAM RESIDENT OFFICE
32330 SANTA ANA CANYON RD
HIGHLAND, CALIFORNIA 92346

REPLY TO
ATTENTION OF:

March 30, 2001

Office of the Chief
Regulatory Branch

Molycorp Inc. Lanthanide Group
Attention: William L. Sharrer
67750 Bailey Road
Mountain Pass, California 92366

Subject: Revised Jurisdictional Determination for Molycorp Mine

Dear Mr. Sharrer:

Reference is made to your application (No. 200001678-AJS) dated June 20, 2000 for a Department of the Army Permit to construct a tailings impoundment ("The East Tailings Storage Area") in an unnamed tributary to Wheaton Wash in Mountain Pass, San Bernardino County, California.

We have reevaluated the proposed project and its jurisdictional status in light of the recent U.S. Supreme Court decision No. 99-1178 for Solid Waste Agency of Northern Cook County (SWANCC), Petitioner v. U.S Army Corps of Engineers dated 9 January 2001. The court held that the "Migratory Bird Rule" was not supported by the Clean Water Act (CWA). Thus, isolated, intrastate waters are for which use by migratory birds is the sole basis for establishing Federal jurisdiction under the CWA are not considered waters of the United States.

As you are aware, our previous determination relied on the use of migratory birds as a nexus to establish interstate commerce on Ivanpah Lake, the large playa lake to which the drainages on your project are tributary. You subsequently appealed this decision based on the recent Supreme Court case. Our Division Appeal Review Officer returned the appeal to us without acting on it since it was based on new information not available at the time of our original determination. During our subsequent review of the project it became apparent that Ivanpah Lake was actually an *interstate* water body, by virtue of the fact that a small portion of the playa extends into Nevada (as depicted on U.S.G.S. quad maps). Our March 7, 2001 site visit confirmed this fact. Although the area of the lake's extension into Nevada has been filled by recent development, contiguous surface water was clearly in evidence on both sides of the CA/NV state line. Thus Ivanpah Lake is not an isolated intrastate water, but an *interstate* water of the United States. By extension, all tributaries to Ivanpah Lake are also considered waters of the United States as defined in 33 CFR Part 328.3(a).

Wheaton Wash forms one of the larger tributary channels to Ivanpah Lake and would therefore be considered waters of the U.S. This would also extend to tributary channels to

Wheaton Wash, including those at the site of the proposed tailings impoundment. Although Wheaton Wash becomes more diffuse on the shallow slopes surrounding the lake boundary, it is clear that surface flows from the wash do eventually reach the lake.

In light of the above we have determined that your proposed project does discharge dredged or fill material into a water of the United States or an adjacent wetland. Therefore, the project is subject to our jurisdiction under Section 404 of the Clean Water Act and a Section 404 permit is required from our office. The geographic extent of Section 404 jurisdiction on your project site remains the same as described in our previous letter of December 6, 2000.

As with our previous determination you have the right to submit an appeal to our Division Appeals Officer as described in the enclosure. Should you decide to resubmit your appeal we would continue to process your application during the appeal process to avoid any unnecessary delays in the event our determination is upheld. If you have any questions, please contact Antal Szijj of my staff at (909) 794-7704.

Sincerely,

original signed by

Mark F. Sudol, D.Env.
Chief, Regulatory Branch